In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 322

ROBERT KEITH CARTER AND BUELL HENLEY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were convicted of narcotics offenses in the United States District Court for the Western District of Missouri and each was sentenced to imprisonment for five years. The convictions were affirmed by the court of appeals on May 20, 1964 (Pet. App. 8, 9). A petition for rehearing was denied on June 15, 1964. The petition for a writ of certiorari was not filed until July 24, 1964, and is therefore out of time under Rule 22-2 of the Rules of this Court.

There is no occasion for this Court to waive its rules; the petition does not in any event present an issue warranting review by this Court. The sole issue raised is the competency of the witness Hines, who testified to being approached by petitioner Henley with a request to assist in the disposition of narcotics. Hines reported the incident to the Narcotics Bureau and an agent, posing as an emissary from Hines, obtained narcotics from Carter.

Hines had been placed on probation for a violation of the Dyer Act in 1957. Probation was revoked in 1960 and Hines was sent to the Medical Center for observation on May 13, 1960 (Tr. 72-73). The psychiatric report of August 9, 1960, was that Hines was then competent, and that, while he presented a history of long-standing mental illness, it was impossible to know his precise mental condition as of 1957 (Tr. 74-75). The staff reported that Hines had "an unclear memory of events particularly concerning his offense which may be due to a partial amnesia as a part of his mental illness. There is a possibility that the amnesia is due to a desire not to remember unpleasant material" (Tr. 75). The offense to which that referred was the Dyer Act violation in 1957. As of the time of the report, August 9, 1960, it was stated that "Although the findings indicate mental illness over a long period of time, the Staff is of the belief that this man is able to consult with his lawyer with a reasonable degree of rational understanding and he has a rational as well as factual understanding of the proceedings against him" (Tr. 76).

It was while Hines was at the Medical Center for observation in August 1960 that he was approached by petitioner Henley to help dispose of narcotics (Tr. 8). Hines reported this conversation to his attorney and to a narcotics agent (Tr. 14). By the time Hines testified at the trial in August 1962, he had completed the sentence imposed on revocation of probation (Tr. 16). As is more fully discussed in the opinion below (Pet. App. 1-7) and the opinion of the district court (Pet. App. 10-21), there can be no serious question of the competency of Hines as a witness. Petitioners' challenge to this ruling is based on the report of Hines' "unclear memory" as to events in 1957. The report itself indicates that this was probably due in part to Hines' desire to forget his own difficulties. It in no way suggests that he was unable to recall the events that occurred in 1960—matters which he immediately communicated to his lawyer. In short, the matter has been carefully appraised by the courts below and there is no reason for further review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

AUGUST 1964

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